NCR Corporation *and* Allied Services Division, Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees, AFL-CIO. Case 4-CA-11744

24 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 2 March 1982 Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally transferring unit work out of its Philadelphia district office to its Paoli, Pennsylvania Rework Center and by eliminating the job classification of rework technician at the Philadelphia district office. We disagree.

The pertinent facts are as follows:

The Respondent maintains a data processing operation whose Field Engineering Division in the United States consists of 15 regions. Each region contains one or more district offices, some of which have sub or branch offices. Certain employees of the Respondent's Philadelphia district and five other districts are represented by the Union and are covered by a collective-bargaining agreement for a bargaining unit which, since September 1979, has included rework[3] technicians. Article XXIII of the collective-bargaining agreement states:

TRANSFERS

1. There shall be no transfers out of this District except by mutual agreement between the parties.

2. Employees transferred into the District shall be placed on the seniority list in accordance with their most recent date of hire except for layoff purposes. For layoff purposes, seniority shall be determined by the date on which such employees entered the District. If bargaining unit employees are transferred from one Union represented District to another, they will retain their seniority in their prior District so that in the event of a layoff in the new District, they will be allowed to exercise their seniority in the prior District.

3. No employees shall be transferred or hired into the District until all employees on layoff status have been given the option to exercise their recall rights as provided in Article XIX. However, such restriction does not apply to the demotion of management within the District into the bargaining unit, provided that the manager's seniority is greater than [that of] those employees on layoff at the time of his/her demotion.

Article XXIV states:

1. Nothing in this Agreement shall be construed to restrict the employer's right to consolidate, merge, or reorganize any District.

2. However, upon reaching such a decision to consolidate, merge, or reorganize the District, the Corporation will notify the Union no less than six (6) weeks in advance of the effective date of such action. The Union then has the right, during that period of time, to request meetings with management to discuss and negotiate the effect, if any, this consolidation, merger, or reorganization will have upon the affected employees. In the event the parties fail to agree on the conditions of such a consolidation, merger, or reorganization, then the Union may submit the dispute directly to Arbitration. However, it is agreed that the operation of this Article shall not restrict management's rights to make territory and work assignments.

On 14 August 1980 the Respondent informed the Union that, as part of a four-step restructuring of its data processing operations, it planned to remove rework from its district offices and consolidate rework functions at a newly created independent office in Paoli, Pennsylvania. Neither party re-

[1] We deny the Respondent's motion to reopen the record to introduce additional evidence relating to the parties' past practice in implementing interdistrict work transfer.

[2] We note that, in his findings of fact, the judge inadvertently refers to the Respondent's labor relations representative Maurice Herron rather than BRAC International representative Jesse Pelham as the individual notified on 14 August 1980 of the Respondent's intention to transfer unit work. The judge's decision is modified accordingly.

[3] Rework is the repair of faulty circuit board components of data processing equipment performed, prior to December 1980, at the Respondent's district offices. Rework also entails the repair of power supply transformers. This latter type of rework is most often performed at the customer's plant.

quested bargaining and by December 1980 rework had been transferred from all district offices to Paoli. This included the removal of bargaining unit work from the Philadelphia district office, elimination of the job classification of rework technician, and removal of four bargaining unit members from that district office.

Contrary to the conclusion of the judge, we do not find that the Respondent failed to comply with Section 8(d) of the Act. Rather, we find that its implementation of the work transfers was in accordance with its reasonable interpretation of the parties' contract. As the judge correctly observes, articles XXIII and XXIV of the parties' agreement give rise to different and conflicting interpretations. By the General Counsel's and the Charging Party's interpretation, articles XXIII and XXIV are mutually exclusive: Article XXIII establishes an obligation on the Respondent's part to obtain the Union's consent before proceeding with an interdistrict transfer, and article XXIV applies only to "merger, consolidation or reorganization" within a given district—i.e., to intradistrict transfers. The Respondent, on the other hand, argues that article XXIV governs both interdistrict and intradistrict transfers and constitutes an effective waiver by the Union of its right to have the Respondent obtain its consent before implementing the Philadelphia-Paoli work transfer.

The Board is not compelled to endorse either of these two equally plausible interpretations of the contract's operation in this case. The present dispute is solely one of contract interpretation. As the Board has stated in *Vickers, Inc.*, 153 NLRB 561, 570 (1965), when "an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it," the Board will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct.[4]

The Respondent had sound reason to believe that its transfer of rework was not prohibited by the contract. The judge specifically found that the Respondent informed the Union of its plans for centralizing rework 4 months prior to implementing that stage of its reorganization plan and in fact solicited the Union's input for another stage of the plan. Moreover, there is no evidence that the Respondent was motivated by union animus, was acting in bad faith, or in any way sought to undermine the Union's status as collective-bargaining representative.[5] Here, the Respondent's action is based on a substantial claim of contractual privilege.[6] Accordingly, we shall dismiss the complaint in its entirety.[7]

ORDER

The complaint is dismissed.

[4] See also *Timken Roller Bearing Co. v. NLRB*, 161 F.2d 949, 955 (6th Cir. 1947); *Consolidated Aircraft Corp.*, 47 NLRB 694, 706 (1943), enfd. 141 F.2d 785 (9th Cir. 1944); *National Dairy Products Corp.*, 126 NLRB 434, 439 (1960).

[5] See *Jos. Schlitz Brewing Co.*, 175 NLRB 141, 142 (1969); *Vickers, Inc.*, supra at 570; *National Dairy Products Corp.*, supra at 439.

[6] See *Jos. Schlitz Brewing Co.*, supra at 142. See also *Boise Cascade Corp.*, 263 NLRB 480 (1982); *Laredo Packing Co.*, 254 NLRB 1, 8–9 (1981); *Consolidated Foods Corp.*, 183 NLRB 832, 833 (1970).

Assuming, arguendo, that the General Counsel's interpretation of the contract is controlling , we would not necessarily find that the Respondent has refused to bargain within the meaning of the Act because a mere breach of the contract is not in itself an unfair labor practice. See *Employees v. Westinghouse Electric Corp.*, 348 U.S. 437 fn. 2 (1955); *National Dairy Products Corp.*, supra at 439; *United Telephone Co.*, 112 NLRB 779, 782 (1955).

[7] In concluding that the Respondent has not breached its obligation to bargain over transfers resulting from district reorganization, we do not reach the issue of whether these transfers are mandatory subjects of bargaining. Although it might be inferred that a centralization of rework would result in increased efficiency in the Respondent's data processing operations, we are reluctant to characterize the reorganization as one involving a change in the basic direction or nature of the enterprise within the meaning of our recent decision in *Otis Elevator Co.*, 269 NLRB 891 (1984). There is no record evidence establishing what part, if any, direct modification of labor costs may have played in the Respondent's reorganization plan. In addition, the Respondent did not raise the issue before the Board even though the hearing in this case was held more than 4 months after the Supreme Court's decision in *First National Corp. v. NLRB*, 452 U.S. 666 (1981), which we interpreted in *Otis Elevator*.

We note also that the parties' bargaining agreement contains a general grievance-arbitration provision. Under the circumstances it may be argued that the more appropriate forum for resolving the parties' conflicting contractual claims would have been an arbitration proceeding. However, the Respondent has not argued at any point in these proceedings that we should defer to an arbitrator under *Collyer Insulated Wire*, 192 NLRB 837 (1971), recently reaffirmed in *United Technologies Corp.*, 268 NLRB 570 (1984) (Member Zimmerman dissenting, but agreeing in relevant part). The Board has declined to apply the principles of *Collyer* when it has not been raised as a defense in an unfair labor practice proceeding. See *Dow Chemical Co.*, 212 NLRB 333, 339 fn. 11 (1974); *University of Chicago*, 210 NLRB 190, 198 fn. 9 (1974); *Nedco Construction Corp.*, 206 NLRB 150 (1973); *MacDonald Engineering Co.*, 202 NLRB 748 (1973); *Asko, Inc.*, 202 NLRB 330 (1973); *Montgomery Ward & Co.*, 195 NLRB 725 fn. 1 (1972). Accordingly, we do not find that deferral is warranted.

Chairman Dotson notes that the complaint does not specifically allege the type of violation on which the Board passes in this proceeding—namely, that the Respondent failed to comply with the provisions of Sec. 8(d) of the Act governing the unilateral modification of a term of the parties' contract. However, in the absence of exceptions, the Chairman finds it unnecessary to pass on the sufficiency of the complaint and joins in dismissing the complaint on its merits.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. This case was tried at Philadelphia, Pennsylvania, on November 5, 1981. The charge was filed on January 1, 1981, by Allied Services Division, Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees, AFL–CIO (BRAC), against NCR Corporation (Respondent). The complaint was issued on February 26, 1981, and alleges that Respondent violated

Section 8(a)(1) and (5) of the Act by transferring certain work out of the collective-bargaining unit without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of employees in that unit with respect to such transferring of unit work. Implicit in that allegation is that the Union did not agree to the transfer of unit work.

All parties were given full opportunity to participate, to produce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by all parties. On December 4, 1981, Respondent filed its brief and attached an appendix marked "Exhibit A and B." On December 17, 1981, the General Counsel filed with me a motion to strike Exhibit A as said document had not been offered or received into evidence at the trial. On January 7 the Union filed a similar motion. About December 23 Respondent filed its opposing motion and an alternative motion to reopen the record for the limited purpose to allow it to introduce into evidence and authenticate Exhibit A. For reasons more fully discussed elsewhere in this decision, I grant the motions of the General Counsel and the Union and deny Respondent's alternative motion to reopen the record inasmuch as I conclude that Respondent has failed to demonstrate good reason why it did not attempt to adduce additional evidence at the trial, or why it did not request additional opportunity to do so, and further because the proferred Exhibit, on its face, is of little probative value in light of the testimony of Respondent's witnesses concerning the subject matter to which the Exhibit purports to relate.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material, a corporation duly organized under, and existing by virtue of, the laws of the State of Maryland and engaged in the manufacture, sale, and service of business equipment in its Fort Washington, Pennsylvania facility. During the past fiscal year Respondent, in the course and conduct of its business, sold products valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania.

It is admitted, and I find, that Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

It is admitted, and I find, that BRAC and its Local 1933 (the Union), are, and have been at all times material, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent, with headquarters located in Dayton, Ohio, is engaged in the manufacture, repair, and service of business equipment. Respondent maintains a data processing operation entitled, United States Data Processing Group (USDPG), of which the field engineering division in the United States is composed of 15 regions with 1 or more district offices contained in each region. Some districts contain more than one office, i.e., sub or branch offices. The Harrisburg, Pennsylvania region encompasses seven district offices. Certain employees in the Pittsburgh and Philadelphia, Pennsylvania district offices are represented by BRAC.[1] BRAC also represents employees in five other districts, i.e., Milwaukee, Wisconsin; Detroit, Michigan; Cleveland, Ohio; New Brunswick, New Jersey; and Hempstead, Long Island.

The regional director of the field engineering division in Harrisburg is Willard Feldmeier. Subordinate to Feldmeier are the district managers, including District Manager Rufus (Bruce) Clemons who manages the Philadelphia district. Subordinate to Clemons are, inter alia, four zone managers. There are approximately 12 field engineers subordinate to each zone manager. Within the preceding 5-year period, the Philadelphia district included suboffices, some of which were closed or merged.

At an office located at Paoli, Pennsylvania (a suburb of Philadelphia), Respondent employs field engineers and, since December 1980, rework technicians. The Paoli office is under the direct supervision of Feldmeier and is not administratively associated with any district, and its employees are not represented by BRAC.

The most recent collective-bargaining agreement between the Union and Respondent covering the Philadelphia district was effective from September 1, 1979, to August 31, 1981, and recognized the Union as exclusive bargaining agent for "all Technical Inspectors, Field Engineer Trainees, Associate Field Engineers, and Field Engineers of the Philadelphia District Field Engineering Department, excluding office clerical employees, shipping department employees, dispatchers, supervisors, guards and professional employees as defined in the Act." In September 1979, the parties, by separate addendum, including the rework technicians in the collective-bargaining unit. Rework involves repair of faulty circuit-board components of Respondent's products, generally performed at the district office, or repair of electrical power-supply transformers most often performed at the customer's plant.

Article XXIII of the collective-bargaining agreement states:

TRANSFERS

1. There shall be no transfers out of this District except by mutual agreement between the parties.

2. Employees transferred into the District shall be placed on the seniority list in accordance with their most recent date of hire except for layoff purposes. For layoff purposes, seniority shall be determined by the date on which such employees entered the District. If bargaining unit employees are transferred from one Union represented District to

[1] The Philadelphia district office is actually located in the suburban area of Philadelphia known as Fort Washington.

another, they will retain their seniority in their prior District so that in the event of a layoff in the new District, they will be allowed to exercise their seniority in the prior District.

3. No employees shall be transferred or hired into the District until all employees on layoff status have been given the option to exercise their recall rights as provided in Article XIX. However, such restriction does not apply to the demotion of management within the District into the bargaining unit, provided that the manager's seniority is greater than those employees on layoff at the time of his/her demotion.

Article XXIV states:

1. Nothing in this Agreement shall be construed to restrict the employer's right to consolidate, merge, or reorganize any District.

2. However, upon reaching such a decision to consolidate, merge, or reorganize the District, the Corporation will notify the Union no less than six (6) weeks in advance of the effective date of such action. The Union then has the right, during that period of time, to request meetings with management to discuss and negotiate the effect, if any, this consolidation, merger, or reorganization will have upon the affected employees. In the event the parties fail to agree on the conditions of such a consolidation, merger, or reorganization, then the Union may submit the dispute directly to Arbitration. However, it is agreed that the operation of this Article shall not restrict management's right to make territory and work assignments.

According to the testimony of Regional Director Feldmeier, Respondent began drafting a plan for the reorganization of USDPG Field Engineering Division in 1979, and "finalized—most of the details" by January or February 1980. That plan was to be effectuated in a sequence of four phases. The first phase provided for the organization of field engineers into groups of about five to seven engineers under a newly created group leader position subordinate to the zone manager. The next phase called for the removal of all rework functions from the district offices and relocation at a single, newly created office independent of the district and subordinate directly to the regional director. Phases three and four involved the removal of the parts managers and dispatching function from the district office.

In early April 1980, a meeting was held by Feldmeier and his superior, Vice President Russ Gilbert of Dayton, Ohio, with all district managers who were instructed to return to their districts and conduct meetings, as Feldmeier testified:

> to discuss with the people just to prevent a bunch of rumors starting up that somebody is going to do this and this. So everybody does exactly the same thing. So every district went back and said, you know, here's what it's going to look like . . . .

Clemons testified that in June 1980 he conducted a meeting of field engineers and zone managers who were not absent. From January to November 1980, Local Chairman Art Blanchette, who had represented the Union in dealing with Clemons, was absent due to illness which led to his ultimate hospitalization. During his absence and thereafter, his duties were assumed by Union Representative Lawrence Nelms. Nelms had no recollection of attending the June district meeting. Clemons did not recall whether Nelms was present. Clemons testified that at the June district meeting he explained to those present the "forthcoming changes," and the "long range plans to move the rework facility when and if a building was located," and that he had "no idea when this would occur."

Maurice Herron holds the position of labor relations representative for Respondent. He testified that prior to August 14, 1980, he invited BRAC International Representative Jesse Pelham to a meeting in Dayton, Ohio, to discuss the "group leader concept" which had already been implemented a month earlier at all nonunion locations in Respondent's operations. He characterized that purpose "as the primary reason for the meeting." He testified that at the meeting with Pelham on August 14 that "as part of that discussion, we talked about the long range plans of removal of rework, the removal of parts and the removing of dispatching, long range." He further testified that he was acting pursuant to article XXIV of the collective-bargaining agreement in order to "let him know that a decision had been made to make this move . . . the decision to regionalize rework" and to provide the Union an opportunity to negotiate the effects upon unit employees of that decision. Herron testified that during his meeting with Pelham he presented slide transparencies which reflected the reorganization plan.

Pelham testified that he did indeed attend a meeting with Herron on August 14 in Dayton for the purpose of discussing the proposed group-leader position, and that a proposed reorganization plan was presented to him for viewing during the meeting. According to Pelham's uncontradicted, more detailed, and credible testimony, virtually all of the conversation concerned the group-leader proposal, and that the discussion concerning the removal of rework from the district arose upon Pelham's observation of the slide transparencies and inquiry concerning the apparent removal of work from the district, and that Herron stated that the Respondent intended to remove unit work "at some time in the future." Further, Pelham testified that Herron asked him what the Union's reaction would be to such a removal, and that Pelham responded that he was not in a position to make a decision but that it was his "impression" that if the employees were "kept whole," i.e., if no employee would lose work, there would probably be no resistance to the removal of the circuit board rework functions, but that "under no conditions" would there be any agreement to the removal of power supply rework. According to Pelham, the discussion regarding rework consumed about 2 minutes at the end of the meeting. As to the subject of the group leader concept, Pelham was to return and discuss it with his superior, Union President Tom

Fitzgibbons, and with "the people at the different locations." Herron did not explicitly contradict Pelham's testimony, but merely testified that he did not recall Pelham's reference to the terminology "make whole."

A copy of the "Proposal for U.S.D.P.G. Field Reorganization," as depicted in the slide transparencies, was forwarded to and received by the Union on or shortly after August 14. Included therein was a "District Reorganization Implementation Schedule" which, inter alia, reflected by way of a chart entry, "Rework Fully out of District and into Regions," and a corresponding arrow reaching to December 31. Pelham had no recollection of viewing that transparency, but I credit Herron's somewhat more certain testimony that the slide projections contained the "District Reorganization Implementation Schedule." Pelham conceded that he was aware of the reorganization schedule as having been included in the proposal that was mailed to and received by the Union. He also conceded similar awareness of the section entitled "How We Intend to Accomplish It" which contains the entry, "Centralize Support Function at Region level: Rework; Inventory Management and Dispatching."

Within the next several weeks, Pelham and Herron conversed on the telephone regarding the group-leader proposal, but nothing was said about any other phase of the proposed reorganization by either party. In a letter dated October 16, 1980, addressed to Pelham, Herron alluded to the August 14 meeting by referring to the group-leader proposal and Herron's expectation that Pelham would take the "group leader proposal to the membership and get back [to Herron] within 2–3 weeks." Herron concluded:

> Since two months has elapsed from the date of our first discussion on this matter and you have been unable to give me a definite answer regarding our offer, we must assume the Union is not interested in the Group Leader program. Therefore, our offer is withdrawn as of this date.

The letter contained no reference to the subject of rework, or any other phase of the proposed reorganization.

District Manager Clemons testified that in mid-November he discussed the removal of rework with district rework technicians Brennan and Black and offered them the opportunity to move to Paoli, the site of the new rework office, or to remain at Philadelphia, inasmuch as Respondent was hiring field engineers for that location at that time. Both Black and Brennan opted to transfer to Paoli. Other rework technicians were offered similar opportunities. Seven other persons who were ultimately hired to perform rework at Paoli had been interviewed by Clemons sometime in September–October. Clemons' testimony as to when he first learned that Paoli was to be the site of the rework office is unclear and uncertain. He testified that he became aware that rework would be removed from his district as early as May, that at the meeting of district managers he received the impression that it would occur in 6 or 8 months, and that sometime between May and December, he became aware that Paoli was the selected site, that he learned the exact removal date "probably" during the last week of November.

Pelham testified that by mid-November he began to receive telephone calls from BRAC local chairmen, including Nelms, informing him of "strong and heavy rumors" of an impending removal of rework from the district, and that when Nelms called him a second time advising that new employees were being hired for rework at the new center, he decided to raise the matter with Herron. Accordingly, at a negotiation meeting concerning other matters at the Milwaukee District at that time, Pelham asked Herron about the rumors. Herron deferred answering and, after calling Clemons, advised Pelham at the next negotiation meeting that the Philadelphia district rework was, in fact, being moved to Paoli at that time. According to Pelham, he protested to Herron that the Union had not agreed to remove any rework from the district and that it had "never indicated any agreement under any conditions" for the removal of power supply rework. Pelham testified that this discussion provided the first occasion for the Union's receipt of any information that Respondent "had a definite intention to remove rework from the Philadelphia District." Herron substantially corroborated the foregoing testimony but added that he responded to Pelham at that time that he had notified Pelham on August 14 of the removal of rework from the districts and its "regionalization" throughout the United States and that Pelham had been given a time schedule for the effectuation of the removal.

During the first week of December, Nelms received a notification from Respondent of associate field engineer Glenda Jacob's requested and approved transfer "to the Rework Center in Paoli," effective as of December 1. Nelms immediately spoke to Clemons and asked about the transfer and the rework center and was told that all rework was in the process of being transferred from the Philadelphia district office to Paoli, and that rework technicians Brennan and Black and field engineer Harry Glasgow, all bargaining-unit members, were being transferred from the Philadelphia district office to the Paoli rework center. Nelms then ascertained from Clemons that rework was being similarly transferred from other districts but that the employees elsewhere chose not to transfer and had accepted other positions and that accordingly new rework employees were being hired at Paoli.

By the middle of December rework had been removed from all districts and consolidated at the Paoli office. The collective-bargaining unit work at the Philadelphia district office was thereby altered by the elimination of rework and the job classification of rework technician, and the removal of four bargaining-unit members. Thereafter, the Union filed the instant unfair labor practice charge.

With respect to past implementation of article XXIV of the collective-bargaining agreement, Herron testified that "whenever there's been a decision to consolidate, merge, or reorganize a district that is represented by the BRAC Union, we had notified the Union prior to such a decision." Pelham, who participated in the negotiation of article XXIV and its drafting, testified in conclusionary

terms as to his interpretation of that article, i.e., that reorganization of a district constitutes an intradistrict reorganization such as the closing or moving of an office or suboffice within the district. On cross-examination, he testified that in his opinion article XXIV was not utilized in the removal of certain "EDP" field engineers from the Philadelphia district. Nelms testified that in the preceding 5 years a district suboffice was moved within the district, and two intradistrict offices were merged, and several field engineers were transferred from one zone manager to another zone manager but that no diminution of unit work occurred. He did not know, however, what article of the collective-bargaining agreement was applied in those situations.

Herron testified that in 1974 "EDP" field engineers were removed from the bargaining unit at the Philadelphia district, and that he participated in negotiations with the Union concerning the removal. Herron testified that the Union was first notified that the removal of EDP engineers was being "contemplated" by Respondent prior to negotiations, and that at the subsequent negotiations the Union resisted the removal of a certain piece of equipment. Respondent accordingly agreed to retain that equipment at the Philadelphia district, but the remainder of the EDP equipment was moved with the EDP engineers to the office at Paoli. Herron, who testified that 3-1/2 years prior to the hearing, the Ashtabula territory and three unit employees were removed from the Cleveland district, which was represented by BRAC, after the Union was notified and after negotiations with the BRAC attorney. Herron testified that there was no movement until after agreement with BRAC was reached. Herron also testified that, with respect to the EDP removal to Paoli, the Union requested a meeting upon notification and that negotiations and agreement with the Union preceded actual implementation of the transfer. Herron testified that in those negotiations not only the effects of the decision, but also the basic decision itself, was discussed with the Union.

Respondent attached to its brief as Exhibit A, a document purporting to be a letter dated April 2, 1974, addressed to BRAC President Thomas Fitzgibbon and signed by R. F. O'Connor, director, personnel and employee relations of Respondent, wherein notice was given of intent to transfer EDP field engineers from the Philadelphia district to a consolidated center in Paoli pursuant to article XXIV of the collective-bargaining agreement. Also attached as Exhibit B was a purported letter dated September 26, 1974, addressed to Respondent, signed by Fitzgibbon, referring to enclosed signed copies of an agreement relative to the establishment of the Paoli EDP center. As noted earlier, I granted the motions of the General Counsel and Charging Parties to strike reference to Exhibit A, and I have denied Respondent's motion to reopen the record for receipt of said document upon authentication. Respondent offered no convincing argument as to why it did not adduce this evidence at the hearing or why it did not ask for a continuance in order to do this. More importantly, the proffered document is, of itself, of no probative value and has no materiality in light of Herron's testimony because, regardless of how Respondent's conduct in 1974 was characterized in the purported letter, Respondent, in fact, provided the Union then with notice of the elimination of unit work, after which the decision itself was discussed with the Union, not merely the effects upon unit employees, and agreement was obtained prior to the removal of unit work. Thus what had occurred in 1974 could arguably have been in de facto accordance with article XXIII.

Thus there is no clear evidence in the record to establish that the parties have historically applied article XXIV to situations where unit work was transferred out of the district pursuant to a unilateral decision of Respondent, and where only bargaining as to the effects of that decision upon unit employees was offered to the Union upon prior notice. Rather, the evidence indicates that historically Respondent has discussed the decision itself to remove unit work and its effects upon employees with the Union and agreement had been reached prior to the execution of that decision.

Finally, Pelham's conclusionary testimony as to the meaning of article XXIV is of no probative value as it does not run to any discussion between the parties relative to the meaning of that article during negotiations of it. His testimony amounts to nothing more than his opinion as to its meaning, after the fact of its negotiation.

Analysis

Section 8(a)(5) and (1) of the Act obliges an employer to notify and consult with the designated exclusive bargaining agent concerning changes in wages, hours, and conditions of employment. *NLRB v. Williamsburg Steel Products*, 369 U.S. 736 (1962). On notice of such proposed change, the employees' bargaining agent must act with due diligence in requesting bargaining; otherwise it may be deemed to have waived its right to bargaining. *City Hospital of East Liverpool*, 234 NLRB 58 (1978); *Citizens Bank of Willmar*, 245 NLRB 389 (1979). The Union's obligation arises upon actual notice regardless of whether it was received from a source other than direct communication from the employer. *Hartman Luggage Co.*, 173 NLRB 1254 (1968). A union may elect to waive its right to notice and bargaining by a contractual agreement, *Bancroft Whitney Co.*, 214 NLRB 57 (1974). A contractual waiver will not lightly be inferred but must be clearly demonstrated by the terms of the collective-bargaining agreement and, under certain circumstances, from the history of negotiations, *Southern Florida Hotel Assn.*, 245 NLRB 561 (1979); *Hilton Hotel Corp.*, 191 NLRB 283 (1971); or from unequivocal extrinsic evidence bearing upon ambiguous contractual language. *Operating Engineers Local 18*, 238 NLRB 652 (1978). Furthermore, contractual language which reserves to the employer the right to make unilateral changes with respect to certain areas will be strictly construed and will not be interpreted to extend to other areas in the absence of specific evidence of such intent. *Southern Florida Hotel Assn.*, supra (see also *Capitol Trucking*, 246 NLRB 135 (1979)).

However, when the proposed change concerning wages, hours, or conditions of employment encompasses a change or modification of an existing collective-bar-

gaining agreement, a stricter obligation is imposed on the employer. It is well settled law that a modification of a clear and unambiguous term of contract of fixed duration, regardless of economic motivation, must be obtained pursuant to a positive affirmance by the employees' bargaining agent, otherwise the requirements of Section 8(d) of the Act are not met and a violation of Section 8(a)(5) results. *C & S Industries*, 158 NLRB 454, 456–457 (1966); *Oak Cliff Baking Co.*, 207 NLRB 1063 (1973); *Sun Harbor Manor*, 228 NLRB 945 (1977); *Fairfield Nursing Home*, 228 NLRB 208 (1977); *Airport Limousine Service*, 221 NLRB 932 (1977); *Keystone Consolidated Industries*, 237 NLRB 763 (1978); *Precision Anodizing & Plating*, 244 NLRB 846 (1979); *Struthers Wells Corp.*, 245 NLRB 1170 (1979). Thus, contractual modification cannot be effectuated by merely providing an opportunity for negotiation to the bargaining agent.

In the instant case the rework function was concededly part of the work of the collective-bargaining unit, and the job classifications which performed that function were explicitly conceded by Respondent at the hearing to have been encompassed within the contract unit description. Moreover, Respondent, according to Herron's testimony, offered to discuss with the Union only the effects of the unit modification.

> . . . we have held that a unilateral removal of bargaining unit work during a contract term is the type of contract modification proscribed by the Act, regardless of economic justification. Further, under Section 8(d) of the Act, a party to the contract cannot be compelled to bargain about such a modification and, accordingly, any modification can be implemented only with the consent of the other party.[4]

[4] See *Los Angeles Marine Hardware Co., a Division of Mission Marine Associates, Inc.*, and *California Marine Hardware Co., a Division of Mission Marine Associates, Inc.*, 235 NLRB No. 88 (1978), and cases cited therein.

See also *Park-Ohio Industries*, 257 NLRB 413 (1981).

I conclude that the Union was notified of Respondent's intention to transfer unit work by the August 14 presentation of the proposed USDPG Field Reorganization. Herron told Pelham that Respondent intended to remove the rework functions and demonstrated the rework removal was but one phase, as was the institution of the concept of group leader position. That presentation included a target date. Although the preponderance of that discussion related to the group-leader position, there was nothing said by Herron which should have led Pelham to conclude that the reorganization was merely a vague contemplation. Herron could not have failed to grasp that Respondent was making such notification by its elaborate projection of slide transparencies reflecting all phases of the reorganization with time targets. The subsequent October letter withdrawing the offer of a group-leader position was limited solely to that subject and cannot reasonably be interpreted as an indication that Respondent was abandoning its reorganization plan.

However, as the removal of unit work clearly amounts to a contract modification, Respondent cannot justify its conduct by failure of the Union to request bargaining and negotiations concerning the proposed modification. Rather, positive affirmance was required in the absence of a waiver by the Union of its right to such positive affirmance. Pelham's tentative reactions at the August 14 meeting did not amount to an agreement in whole or in part to the announced removal of all rework functions from the bargaining unit. On the contrary, the last statement of position of the Union was that it would be unalterably opposed to the removal of power-supply rework. Thus the silence of the Union cannot be construed as a tacit agreement.

Respondent argues that article XXIV of the collective-bargaining agreement constitutes a clear waiver of the Union's right to agree as a condition precedent to the removal of unit work since such removal occurred as part of a reorganization of the district. The General Counsel argues that article XXIV, on its face, applies to merger, consolidation, or reorganization of the district, not districts, and cannot be interpreted as extending to mergers, consolidations, and reorganizations involving offices outside of the district, or the transfer of employees outside of the district, the latter of which is covered explicitly by article XXIII which requires agreement of both parties. Accepting the General Counsel's argument, there would then be no inconsistency between article XXIII and article XXIV, whereas such inconsistency appears to exist if Respondent's interpretation is accepted. Moreover, it can be argued that article XXIV is more generic in its description of Respondent's rights, i.e., a district reorganization does not necessarily entail a transfer of unit employees, whereas article XXIII is specifically addressed to the interdistrict transferring of employees. However, conversely it can be argued that article XXIII applies to situations of individual employee transfer and does not apply to reorganization where work is transferred, and which is addressed in article XXIV, and therefore no inconsistency exists. Moreover, it can be argued that the reference to merger, consolidation, or reorganization cannot be interpreted to apply solely to internal restructuring. The language of article XXIV does not refer to mergers and consolidations of branch offices or suboffices, but refers to a merger or consolidation of the district, not a merger or consolidation within the district, and a district can only be merged or consolidated with other districts, not with itself. Further, it can be argued that the term reorganization implies contraction and expansion, as well as restructuring of functions within the district.

I conclude that the language of article XXIV is, at best, ambiguous and does not clearly constitute a waiver of the Union's right to be consulted and to agree to the transfer of unit work out of the district. I also conclude that the evidence does not demonstrate that such waiver was intended by the parties who negotiated article XXIV, and that no unequivocal extrinsic evidence was adduced to establish such intention.

Respondent finally argues that the Supreme Court's recent decision in *First National Corp. v. NLRB*, 452 U.S. 666 (1981), is controlling herein. However, the Court in that case dealt with the shutdown by the employer of an

economically failing part of its business which changed the scope and direction of the enterprise. Furthermore, the court explicitly stated that it was not encompassing within its decision other types of management decisions such as plant relocations, subcontracting, changes in methods of distribution, or sales of portions of business. Clearly then, Respondent's conduct is distinguishable from that conduct which the Supreme Court found lawful in the *First National* case.

I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by its unilateral modification of the collective-bargaining agreement consisting of the transferring out of unit work and elimination of unit job classifications without bargaining with *and* obtaining the agreement of the exclusive collective-bargaining agent of employees in that bargaining unit.

CONCLUSIONS OF LAW

1. The Respondent, NCR Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Allied Services Division, Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees, AFL-CIO, and its Local 1933, are labor organizations within the meaning of Section 2(5) of the Act, and have been designated and are the exclusive bargaining representative of the employees in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act consisting of all technical inspectors, field engineer trainees, associate field engineers, field engineers, and rework technicians of the Philadelphia district field engineering department, excluding office clerical employees, shipping department employees, dispatchers, supervisors, guards and professional employees as defined in the Act.

3. About December 1, 1980, Respondent, without bargaining and agreement with the designated exclusive bargaining agent, and by failing to comply with its obligations under Section 8(d) of the Act, unilaterally modified the collective-bargaining agreement by transferring out of the Philadelphia district office to the Paoli rework center the unit work consisting of rework functions and eliminating the job classification of rework technician at the Philadelphia district office and has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) and Section 8(a)(1) and (5) of the Act.

THE REMEDY

Having found that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally transferring unit work out of the Philadelphia district office to the Paoli rework center and by eliminating the job classification of rework technician at the Philadelphia district office, I recommend that Respondent be ordered to cease and desist from such conduct, and to post an appropriate notice, and to take certain affirmative action. I conclude that a status quo ante remedy is appropriate and necessary in this case, and I recommend that Respondent be ordered to transfer back to the Philadelphia district office all rework functions performed there prior to the unilateral action, and to restore there the job classification of rework technician, if, after an elapse of a reasonable period of time not to exceed 60 days, it has bargained in good faith with the Union but has failed to obtain the positive affirmance of the Union to the aforesaid transfer of unit work and elimination of unit job classifications.

Inasmuch as there is no evidence of loss of earnings or benefits of any employee involved in the transfer of unit work from one suburban area to another suburban area of Philadelphia, I shall not recommend a make-whole remedy.

[Recommended Order omitted from publication.]